

**ORIGINAL
FILED**

JUL - 9 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Gary Snodgrass
CDCR #: C-50459
CTF-Central
P O Box 689
Soledad, CA 93960-0689

Petitioner In Pro Se

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-filing

(PR)

JSW

GARY SNODGRASS,

Petitioner,

v.

BEN CURRY, Warden,
California Training Facility, Soledad, CA.,

Respondent.

CV 08

3322

Case No.:

California Supreme Court Case No. S162262
1st App. Dist., Div.3, Case No. A120907
Contra Costa Superior Court No. 071708-2
Former Criminal Case No. 26252

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PETITION
FOR WRIT OF HABEAS CORPUS

I.

INTRODUCTION

Petitioner Gary Snodgrass suggests to this Court that it should be highly concerned whether the Board of Parole Hearings, which carries out the final stage of the sentencing function begun by a California Court when it sentenced him to an indeterminate sentence under Penal Code §1168(b), has applied its authority according to all applicable legal standards. During the jury trial, evidence was presented that Snodgrass suffered a mental disorder from years of parental and sibling abuse that culminated in the instant offense. Notwithstanding the severity of the Murder charge against him, the trial court granted him bail, and he remained on bail without incident until his trial. (**Exhibit B**, marked pages 13-14, sentencing transcript,

ORIGINAL

1 where the Court made note of this in computing in-custody credits.) It makes no sense at all
2 for the Board to conclude, 26 years later, and after years of therapy and positive programming,
3 and after many forensic evaluations attesting to his lack of danger to society if paroled, after
4 thirteen parole hearings, that he continues to pose an unreasonable risk of danger to society.
5 The Court should not, for any reason, simply defer to the Board's findings and conclusions.
6 Rather, it should carefully scrutinize the allegations, the facts, and the evidence proffered in
7 support, to determine if the Board abused its discretion and, if so, to question why the Board
8 would have done so. Snodgrass offers documented evidence that the Board may well be
9 misapplying its authority, misinterpreting the enabling statute, regulations, and authority,
10 and/or acting pursuant to a *sub rosa* policy against granting paroles. Snodgrass's offense, after
11 considering all circumstances, cannot reasonably be interpreted as containing elements beyond
12 those minimally necessary to sustain the conviction for second degree murder, and certainly no
13 elements to justify repeated denial of parole long past the appropriate term of imprisonment set
14 forth by the Board's own sentencing regulations. The State claims it always gives
15 "individualized consideration" to prisoners via its hearings, but this is precisely how a pro
16 forma sham process is accomplished, through hearings giving the appearance of due process
17 compliance and "individualized consideration" but where the final decision is determined from
18 the outset. This was noted by the California Appellate Court as early as 2000 in the seminal
19 case of *In re Rosenkrantz*, 80 Cal.App.4th 409, at 428 ["It is one thing to go through the
20 motions so that a panel can recite a post hoc rationalization for a decision already made. It is
21 quite another to hold a fair hearing at which three unbiased commissioners actually read the
22 reports and other documents in Rosenkrantz's file and then make a reasoned decision based on
23 the appropriate factors."]. In Gary Snodgrass's case, there is not an ounce of relevant or
24 reliable evidence that he currently poses an unreasonable risk to the public safety, and this is
25 the bottom line determination by law. *In re Lee*, 143 Cal.App.4th 1400, 1408 (2006).

26 The duty of this Court is to stand as the last bastion of protection against arbitrariness
27 of official action and to safeguard the constitutional process of these hearings; when it does not
28

1 do so, then it implicitly condones a system of official action that is not being regularly
2 performed as the law requires.

3 4 II.

5 THE MATTER OF JUDICIAL REVIEW

6 Under prevailing law, Petitioner recognizes that the standard of judicial review of
7 parole decisions is the deferential “some evidence” standard. (*In re Powell*, 45 Cal.3d 894
8 (1988); *In re Rosenkrantz*, 29 Cal.4th 616, 653 (2002).) Recent case law has spotlighted
9 deficiencies and divergent applications by the lower courts, with the current consensus being
10 that when a court reviews the reasons given by the Board (or Governor) to deny parole, the
11 question is NOT whether there are facts in the record for the existence of that reason, but
12 whether there is a logical and sufficient connection between the reason and the conclusion that
13 the parole applicant presently poses an unreasonable risk of harm to society if paroled. (*E.g.*,
14 *In re Lee*, 143 Cal.App.4th 1400, 1408 (2006); *In re Scott (Scott II)*, 133 Cal.App.4th 573, 595
15 (2005); and *In re Roderick*, 154 Cal.App.4th 242, 263 (Cal.App. 1 Dist., Div. 4, 08-17-07)
16 (referencing same).) The *Roderick* court noted the dissent’s rejection of this interpretation, and
17 pointed out that the flaw in the dissent’s reasoning “would require judicial affirmance of every
18 Board decision if even a single unsuitability factor is found, regardless of whether that factor
19 would rationally support a conclusion, based on individualized consideration, that the inmate
20 would pose an unreasonable risk of danger.” *Ibid*.

21 ([http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=65258&doc_n](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=65258&doc_no=A113370)
22 [o=A113370](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=65258&doc_no=A113370).)

23 Division 2 of the First Appellate District also mirrors *Roderick*’s interpretation. In the
24 case of *In re Barker*, 151 Cal.App.4th 346, at 366 (Cal.App. 1 Dist., Div. 2, 05-24-07), the
25 court followed *Lee, supra*, at 1408, holding that “the test in reviewing the Board’s decision
26 denying parole ‘is not whether some evidence supports the *reasons* [the Board] cites for
27 denying parole, but whether some evidence indicates a parolee’s release *unreasonably*
28 *endangers public safety*. [Citations.] Some evidence of the existence of a particular factor does

not necessarily equate to some evidence the parolee's release unreasonably endangers public safety.' (*Lee, supra*, 143 Cal.App.4th at p. 1408, 49 Cal.Rptr.3d 931, fn. omitted.)." **The**

Respondent did not appeal this decision.¹

(http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=132240&doc_no=A114686.)

Thus, under the deferential "some evidence" standard, the Court must undertake adequate scrutiny of the Board's decision to determine whether the reasons given for parole denial are not only have a relevant and reliable factual basis in the record, but also that they reliably and with relevance support a conclusion that the parole applicant current poses an unreasonable risk of danger to public safety if paroled.

Petitioner submits that no such evidence exists in this case, and that all of the evidence shows that he poses little or no risk to public safety if paroled.

¹ Petitioner asks the Court to note the history of the Wen Lee case. The Appellate court originally summarily denied the petition filed 02/02/2006 on 03/24/06. Petitioner filed for review on 04/03/2007 (S142267). The Supreme Court ordered the appellate decision vacated on 06/20/2007 and to issue an order to show cause. On 10/17/2006, the appellate court GRANTED the petition. The Respondent (AG) requested depublication on 01/16/2007 and filed for review on 01/17/2007. Petitioner opposed depublication on 01/22/2007. The Supreme Court denied review on 02/07/2007, implicitly affirming the interpretation of the "some evidence" standard by the *Lee* court. Thus, the dissent in *Roderick*, and the subsequent decision in *In re Jacobson*, 154 Cal.App.4th 849, 63 Cal.Rptr.3d 222 (Cal.App. 2 Dist., Div. 4, 08-28-07), rejecting *Lee, supra*, and cases following *Lee*, simply has no traction for the rejection of prevailing interpretation. (at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=1127487&doc_no=B188831.) That the Supreme Court has granted review in *In re Lawrence*, 150 Cal.App.4th 1511, 59 Cal.Rptr.3d 537 (Cal.App. 2 Dist., Div. 7, 05-22-07), on the sole issue of "to what extent should the Board of Parole Hearings, under Penal Code section 3041, and the Governor, under Article V, section 8(b) of the California Constitution and Penal Code section 3041.2, consider the prisoner's current dangerousness, and at what point, if ever, is the gravity of the commitment offense and prior criminality insufficient to deny parole when the prisoner otherwise appears rehabilitated," is not necessarily indicative that the Supreme Court will disagree with the *Lee* interpretation of the "some evidence" standard which was relied on by the *Lawrence* court. (At <http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&docid=1127487&docno=B188831>.)

**A. The “Some Evidence” Standard of Judicial Review
Is Inappropriate Where Board Irregularity Is Apparent:**

Notwithstanding that the current accepted standard of judicial review is the deferential “some evidence” standard, Petitioner suggests, and argues, that the “some evidence” standard is inadequate under any circumstances to safeguard a parole applicant’s due process rights and his substantial liberty interests in parole, which interests were found by the Ninth Circuit Court of Appeals in *McQuillion v. Duncan*, 306 F.3d 895, 901-903 (2002), relying on *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979). In a situation, as here, where there is evidence of irregularity of official action concerning the Board of Parole Hearings, evidence of irregularity simply proves that the “some evidence” standard violates the parole applicant’s liberty interest in parole, because if the proper standard were in place the irregularity would have been ferreted out and rectified long ago.² Instead, the history of the Board and Governor’s actions show irregularity and inconsistent actions when measured against the statutory and regulatory language of Board authority. (See, e.g., *Martin v. Marshall*, 431 F.Supp.2d 1038, 1048-49 (N.D.Cal. 2006), and *Martin v. Marshall*, (*Martin II*) 448 F.Supp.2d 1143 (N.D. Cal. 2006), judgment modified [finding evidence of such policy and capitulation with that former policy by Gov. Schwarzenegger’s appointees].)

More recently, in the Santa Clara Superior Court case of *In re Criscione*, No. 71614 (review granted Sixth Appellate District No. H032048, 09/14/2007), submitted here for the factual findings made evidencing a complete “malfunctioning” of the Board’s administration of the parole scheme, these findings more than adequately weigh in favor of a finding of “irregularity of official action” and thus provides the predicate facts for raising the issue of a proper standard of judicial review when irregularity is present.

² In this “long ago” regard, the federal district court in *Coleman v. CA. Bd. of Prison Terms*, CV-S-96-0783 (LKK-PAN)) found clear evidence that under the former terms of Governors Wilson and Davis, a no-parole policy existed. These findings of fact were not overturned by the Ninth Circuit when it denied in part and affirmed in part the State’s appeal. (See, **Exhibit VV.**)

Petitioner suggests, and argues, that the "some evidence" standard cannot be applied in his case, where the evidence strongly suggests irregularity and malfunctioning of official action by the Board. Rather, he argues that the Court must apply a more stringent standard to determine whether the record in his case is legally sufficient to justify a denial of parole.

Evidence Code section 664 presumes "that official duty has been regularly performed. The effect of the rebuttable presumption created by the Evidence Code, that official duty has been regularly performed, is merely to impose upon the party against whom the presumption operates the burden of proof as to the nonexistence of the presumed fact. (*See California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, as modified.) Presumption that official duty has been regularly performed is rebutted when irregularity is clearly shown. (*See Application of Elsholz* (1964) 228 Cal.App.2d 192.) "the effect of the rebuttable presumption created by section 664 is merely "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (*California Advocates for Nursing Home Reform v. Bonta, supra*, at 505, citing *Gee v. California State Personnel Bd.* (1970) 5 Cal.App.3d 713, 718.)

Agencies are not normally delegated power to determine authoritatively whether they complied with generally applicable rule-making procedures. As a result, courts may usually determine the lawfulness of agencies' compliance with those rule-making procedures entirely de novo, simply substituting their judgment on that question for that of the agencies." (*California Advocates for Nursing Home Reform v. Bonta, supra*, at 505; citing *Bonfield, State Administrative Rule Making* (1986) § 9.2.12, at p. 582.)

1. The Application of 15 CCR § 2402(c) In All Cases Shows Irregularity:

Here, the decisions of the Board of Parole Hearings are apparently predicated on its view that the enabling statute, §3041, permits it to deny parole in nearly all cases of indeterminately-sentenced "term-to-life" prisoners who appear before it, and to shoehorn all murder offenders into §2402(c) of the Cal. Code of Regulations, tit. 15, Div. 2, as the

1 *Criscione* court found to be true.³ Thus, by separate motion, Snodgrass asks the Court to grant
2 discovery and order the Respondent to provide the Court with the same documents it provided
3 in the *Criscione* case.⁴

4 Petitioner argues that the Board cannot deny parole to all murder offenders by
5 classifying their crimes as "especially heinous, atrocious, or cruel" under §2402(c), for the
6 same reasons expressed by the *Criscione, supra*, court. As Petitioner has shown in the petition,
7 this is precisely what the Board has done at each of his thirteen hearings. By relying on these
8 static factors interminably, the Board denies him parole for the very reason he is eligible for
9 parole in the first instance --- his offense. This the Board cannot do, certainly not in a second
10 degree murder case. These regulations perform a sub rosa policy function, i.e., to give the
11 Board all-encompassing *reasons* to cite for denial of parole which a reviewing court will
12 usually be pre-inclined to defer to.

13 **2. The Parole Denial Rate of 95-99 Percent Demonstrates Irregularity:**

14 In addition to the practice of putting all murder cases into the §2402(c) category trap,
15 the plain language of the statute states unequivocally that a parole release date "shall normally"
16 be granted. Whether that "shall normally" applies individually or to the class is
17 inconsequential; by either application a denial rate over 51% would raise serious questions of
18 whether the Board's duty to its parole charter is being regularly performed. Granted, while
19

20 ³ Petitioner also submits **Exhibit WW**, which is a Declaration by Federal Public Defender
21 Monica Knox in the habeas case of Dennis Kimble, where the court permitted extensive
22 discovery. The results of that discovery showed that in every case of parole denial, the Board
23 cited the offense characterizations of section 2403(c) in some form or other. This declaration,
24 dated April 24, 2001, predating the same findings by the *Criscione* court, but which never got
25 judicially resolved due to the Board granting Kimble parole and releasing him, thus mooted the
26 value of that discovery. (Petitioner suggests that the parole of Kimble became a ploy by the
27 Respondent to prevent an unfavorable decision based on indisputable facts.)

28 ⁴ To do that, this Court must issue an Order to Show Cause because, pursuant to *California Bd.*
of Prison Terms v. Ngo, 130 Cal.App.4th 121 2, 1240-1243 (Cal.App. 6 Dist., 07/05/2005),
discovery is available once an Order to Show Cause has issued. A prima facie claim is one where
the petitioner has stated facts which, if true, would entitled him to relief, not that he has to prove
them at the time the petition is filed. *People v. Duvall*, 9 Cal.4th 464, 474 (1995).

1 some fluctuations would result over time, it cannot reasonably be said that a consistent record
 2 of 95% to 99% constitutes regular performance of the statutorily-enabled charter. (This rate is
 3 found true in *In re Rosenkrantz, supra*, 29 Cal.4th 616, 683-684 (2002).) It was also noted in
 4 1985 in the case of *In re Jackson*, 39 Cal.4th 464, at 474.

5 “When statutory language is clear and unambiguous, there is no need for construction
 6 and courts should not indulge in it.” (*People v. Overstreet* (1986) 42 Cal.3d 891, 895.)

7 However, “courts resist blind obedience to the putative ‘plain meaning’ of a statutory phrase
 8 where literal interpretation would defeat the Legislature’s central objective.” (*Leslie Salt Co.*
 9 *v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 614.) Here, the
 10 statutory language guiding the paroles of indeterminately-sentenced prisoners is clear and
 11 unambiguous and the Court must order the Board of Parole Hearings to obey the law in the
 12 determination of Petitioner’s parole application. Penal Code §3041 has been determined to
 13 contain an “expectancy of release” by plain and unambiguous mandatory language, thereby
 14 creating a protected liberty interest under both state and federal constitutional law. (*In re*
 15 *Rosenkrantz*, 29 Cal.4th 616, 673 (2002); *McQuillion v. Terhune*, 306 F.3d 895, 901-903 (9th
 16 Cir. 2002).) There is no question but that the statute contains a presumption favoring the
 17 setting of parole releases dates “more often than not.” While the acceptable percentages of
 18 “shall normally” has not been determined by state and federal courts reluctant to define this
 19 common sense term, there can be no question but that 95% to 99% denials of parole across-
 20 the-board deprives state prisoners of their protected liberty interests and violates the parole
 21 charter of the Board. Penal Code §3041, subd.(b) contains the exception to granting parole. In
 22 the *Criscione* case, **Exhibit OO**, at page 11, expert statistician Professor Kafai testified that
 23 “more than 50% can’t by definition constitute an exception.” (*See In re Ramirez*, 94
 24 Cal.App.4th 549, 570 (2001) [exception to granting parole may not swallow the rule that parole
 25 is normally to be granted].)

26 Since the Board of Parole Hearings cannot show justification for their policy and
 27 practice of a virtually “closed door” policy against parole, where the exception has become the
 28 rule, this policy and practice flouts explicit statutory mandates such that an abuse of authority

1 is so palpably unreasonable and arbitrary that it demonstrates an abuse of discretion, and thus a
2 showing of irregularity of official action.

3 **3. A More Stringent Standard of Review Is Required**

4 Therefore, notwithstanding that the “some evidence” standard is the norm for reviewing
5 habeas petitions challenging parole decisions, this standard is constitutionally inadequate
6 where official action is shown to be irregularly performed. Petitioner only has to demonstrate
7 irregularity with evidence sufficient to dispel the presumption of regularity, after which the
8 habeas court must apply a more stringent standard of judicial review.

9 Petitioner asks the Court to so find, and to apply the “independent judgment test” or the
10 “substantial evidence test” to determine if the conclusion of the Board that he poses an
11 unreasonable risk of threat to public safety is warranted by the evidence before it.

12 Petitioner asks that the Court consider the reasoning in *Superintendent v. Hill*, 472 U.S.
13 445, at 455 (1985) when it established the deferential “some evidence” standard of judicial
14 review. In applying this standard of review to the prison disciplinary process – not the parole
15 context – the High Court said that “Prison disciplinary proceedings take place in a highly
16 charged atmosphere, and **prison administrators must often act swiftly on the basis of**
17 **evidence that might be insufficient in less exigent circumstances.** See *Wolff*, 418 U.S., at
18 562-563, 567-569, 94 S.Ct., at 2977-2978, 2980-2981.” (emphasis added.) The due process
19 analysis called for, however, weighs substantially differently in the parole context. First, the
20 prisoner’s interest in parole is greater. In the prison disciplinary context, the prisoner stands to
21 lose some days of good time credit. Because that will delay his release by that many days, his
22 interest is great, but the decision will not control whether he ever regains his liberty. In
23 California, the **most** credit forfeiture a prisoner can suffer following a disciplinary action is
24 360 days, and that is possible only upon a finding of serious violent misconduct (15 CCR, Div.
25 3, §3323), and only upon the preponderance of evidence. (*Id.*, at §3320(1).) The parole
26 suitability hearing is significantly different. A denial of a parole date doesn’t just delay a
27 prisoner’s release by a set number of days, it leaves the very real possibility that the prisoner
28 may never be found suitable for parole, or that he will be denied in long 2-5 multi-year denials

1 before again appearing before the Board. Both the federal and state courts have determined that
 2 Section 3041 of the Penal Code, which enables the Board's authority to grant or deny parole,
 3 creates an "expectancy of release" that is a liberty interest protected by due process of law.
 4 (*McQuillion v. Duncan*, 306 F.3d 894 (9th Cir. 2002); *Biggs v. Terhune*, 334 F.3d 910 (9th Cir.
 5 2003); *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123 (9th Cir. 2006); *Irons v. Carey*,
 6 479 F.3d 658 (9th Cir. 2007); *In re Rosenkrantz*, 29 Cal.4th 616 (2002).) Section 3041
 7 explicitly creates, by mandatory language, the presumption that in most cases parole is
 8 **normally to be granted**. Thus, the prisoner's side of the due process balancing is substantially
 9 weightier than it is in a disciplinary context. A parole grant places the prisoner in a
 10 significantly higher liberty interest that promises his release by the term fixed by the Board
 11 upon a finding of "suitability" unless by his own actions he later forfeits that suitability
 12 finding.

13 Additionally, the interest of the Board in proceeding with less rather than more due
 14 process protections is substantially less than the interest of the prison in disciplinary
 15 proceedings and maintaining discipline and order. The Board has no need to act swiftly, it does
 16 not act in the charged atmosphere of a prison, it is not charged with keeping order and
 17 discipline inside the prison, and no exigencies exist to justify such a low quantum of evidence
 18 by the Board. In *Hill*, the Court noted the legitimate interests of the prison in proceeding
 19 without "burdensome administrative determinants," *id.*, 472 U.S. at 455, but the Board does
 20 not have similar interests in avoiding administrative determinants. Indeed, under California
 21 law, the Board is already compelled to provide a hearing, a right to be heard and present
 22 evidence, due consideration of all relevant information, a record of the proceeding, a fair and
 23 neutral decision-maker, a decision that is not arbitrary or capricious and is supported by some
 24 evidence, and counsel. (E.g., PC §3041.5(a); PC §3041.7; *In re Sturm*, 11 Cal.3d 258 (1974);
 25 *In re Minnis*, 7 Cal.3d 639 (1972); *In re Rosenkrantz*, 29 Cal.4th 616 (2002); *O'Bremski v.*
 26 *Maass*, 915 F.2d 418, 422. *See also In re Morall*, 102 Cal.App.4th 280, 289-290 (2002),
 27 summarizing the statutory and regulatory authorities.)
 28

Given these considerations, the substantial liberty interests that enhance a prisoner's interests, and the Board's decreased interest, it is clear that the due process analysis weighs in favor of a quantum of evidence on judicial review more stringent than the "some evidence" standard for disciplinary proceedings. There is no justification for a standard as low as "some evidence" – which is the lowest standard of review constitutionally permitted.

In the 2001 case of *In re Ramirez*, 94 Cal.App.4th 549, at 563, the appellate court noted that the Supreme Court in *In re Powell*, 45 Cal.3d 894, carefully restricted its holding on the applicable standard of judicial review to parole rescission proceedings. The *Ramirez* court also said:

"On the other hand, we also agree with the Board that such determinations are reviewable for abuse of discretion under the "arbitrary and capricious" standard. The two formulations are not inconsistent, as was implicitly recognized in *Powell, supra*, 45 Cal.3d at p. 904, 248 Cal.Rptr. 431, 755 P.2d 881. The Board conceded at oral argument in this case that a decision made without any supporting evidence would be arbitrary and capricious. (*See People v. Cluff* (2001) 87 Cal.App.4th 991, 998, 105 Cal.Rptr.2d 80.) It follows that searching the record to determine whether some evidence supports the Board's parole suitability determination is a regular function of deferential review for abuse of discretion.

In the final analysis, considering this history, and the State judiciary's concern that the Board's decisions not be allowed to rest undisturbed when an abuse of discretion is apparent, the Court here should not shun its duty to apply a more stringent standard of review when the evidence indicates abuse of discretion or irregularity of official action, as here.

III.

NO EVIDENCE SUPPORTS PAROLE DENIAL

Petitioner has made three claims for relief, as follows:

1. Petitioner is unlawfully imprisoned in violation of the Due Process Clause of the Fourteenth Amendment because of Board of Parole Hearings, at his 2006 hearing, his 13th hearing, had no evidence to sustain Board findings that he currently posed an unreasonable

1 risk of danger to society if released to parole. (*In re Dannenberg*, 34 Cal.4th 1061 (2005); *In re*
2 *Rosenkrantz*, 29 Cal.4th 616 (2002) ; *Superintendent v. Hill*, 472 U.S. 445 (1985).)

3 2. Petitioner is unlawfully imprisoned in violation of the Due Process Clause of the
4 Fourteenth Amendment because the Board of Prison Terms, at his 2006 hearing, has essentially
5 transformed his Second Degree Murder sentence into a First Degree Murder sentence or a Life
6 Without Possibility of Parole Sentence without authority when it interminably relies upon the
7 commitment offense as cause for denial of parole.

8 3. Petitioner also contends that the Board applies a *sub rosa* policy indicative of an
9 anti-parole policy by applying 15 CCR §2402(c) (“especially heinous, atrocious or cruel”) to
10 every murder offense, regardless of whether the individual offense meets the “beyond the
11 minimum necessary to sustain the conviction” standard set in *In re Dannenberg*, 34 Cal.4th 1061
12 (2006), thus ignoring not only *Dannenberg*, but also the statute (Section 3041(b)) and its own
13 regulations (§§2401-2405) guiding its discretion.

14 15 **Re: Ground One:**

16 As to the first ground, even if reviewed under the deferential “some evidence” standard,
17 pursuant to the judicial interpretations in *Lee, supra*, 143 Cal.App.4th 1400, and its progeny, the
18 record that was before the 2006 Panel clearly showed that there was not “some evidence”
19 Petitioner Snodgrass posed an unreasonable risk of danger to public safety if paroled. This
20 “unreasonable risk” standard is explicit in 15 CCR §2402(a). As shown in the petition and the
21 supporting exhibits, both the CDCR correctional counselors and their supervisors, and the
22 psychiatrists and psychologists, as well as Snodgrass’s prison record of programming and
23 achievements, all demonstrate that he does NOT pose an unreasonable risk if paroled. Despite
24 the Probation Officer’s Report indicating offense mitigation due to familial hostilities and mental
25 issues, the Board has done nothing less than maintaining Snodgrass under §2402(c)’s
26 categorizations of “especially heinous, atrocious or cruel” for purposes of parole denial.

27 Compared with other cases, as referenced above and *infra*, where the courts have found
28 no rational evidence to place the offender in those categories, the instant offense also does not

1 meet that standard. Snodgrass was mentally, emotionally, abused since age 7 by the stepfather,
 2 and also sexually by the older stepbrother. He grew up angry, and when his stepfather told him
 3 the family, except him, was moving, and selling the house, Snodgrass's anger reached 'critical
 4 mass.' He did not 'plan' the murder, as a more rational person might; rather, he 'dreamed' of
 5 taking revenge, more of a fantasy than a plan, which is evident by not fleeing and not claiming
 6 innocence upon arrest. Board regulation, §2402(d)(4), allows the Board to find mitigation where
 7 evidence of significant stress in the prisoner's life, especially if built up over a long period of
 8 time. Here, not only was there significant stress over a long period of time, but worse, during
 9 Snodgrass's most innocent, formative years. He did not ask to be raised in such a dysfunctional
 10 environment or to be victimized by his step-sibling or stepfather. Board regulation §2405
 11 (Circumstances in Mitigation of the Base Term), includes (2) "The prisoner participated in the
 12 crime under partially excusable circumstances that do not amount to a legal defense," which, in
 13 this case, might have been his being victimized throughout those years. The Board could, were it
 14 reasonable, apply §2402(d)(5) (Battered [] Syndrome) to Snodgrass's circumstances, (cf., Penal
 15 Code 13732), but it refuses to recognize these circumstances in mitigation. Section 2405(6) also
 16 recognizes mitigation when "The crime was committed during or due to an unusual situation
 17 unlikely to reoccur." The Probation Officer's Report recognized this factor to exist. (**Exhibit**
 18 **LL**, pp. 18-19.) The Board hasn't. What is wrong with the Board? Untrained? Unqualified?
 19 This seems to be the conclusion of the *Criscione*, *supra*, superior court.

20 15 CCR §2405(7) also provides mitigation where "[t]he crime was committed during a
 21 brief period of extreme mental or emotional trauma." Even though the significant stress in
 22 Snodgrass's life was a long-term build-up, it cannot be said that the "straw that broke the camel's
 23 back" when the stepfather discarded him by telling him the rest of the family was moving and
 24 that he was not welcome, that the house he lived in was being sold, did not inflame the anger he
 25 had endured for years, such that the culmination of that anger was the instant offense. Snodgrass
 26 had no history of criminal behavior, as the trial court (**Exhibit B**, sentencing transcript p. 11),
 27 and the Probation Officer noted (**Exhibit LL**, POR pp. 18-19.)
 28

1 Snodgrass decided to kill his stepfather, that's true. He put the rifle in the garage where
2 he could get to it when he was ready. That's true. He accidentally discharged the weapon,
3 causing the stepfather to appear. That's true. The stepfather showed anger, and Snodgrass shot
4 him once, wounding him. The stepfather began cursing at him. Snodgrass shot him again,
5 mortally wounding him. The police were already arriving. Snodgrass did not flee. He admitted
6 shooting the stepfather. He was arrested. Bail was set. He was released on bail until his
7 conviction by jury trial. He presented no threat or danger to public safety during that period of
8 time.

9 No circumstances exist here beyond the minimum elements necessary to sustain the
10 conviction of second degree murder. According to prevailing case law, denial of parole without
11 such a supported finding of elements beyond is a denial of due process, and habeas relief is
12 required. (*In re Dannenberg*, 34 Cal.4th 1061, 1095 (2006).)

13 In the post-*Dannenberg* case of *In re Cooper*, 153 Cal.App.4th 1043, 62 Cal. Rptr.3d 907
14 (Cal.App. 1 Dist., Div.2, 07/27/2007), the appellate court distinguished the factual circumstances
15 with those in *Dannenberg*. Peter George Cooper killed his wife with a sledgehammer. The
16 Board granted parole in 2006, five years after his Minimum Eligible Parole Date (MEPD) had
17 lapsed. Classifying the offense as "especially heinous" because Cooper struck his wife multiple
18 times with a sledgehammer, then tried to cover it up by transporting her body in the trunk of her
19 car and leaving it at an airport. The court concluded that if Cooper had stopped striking his wife
20 at the first blow, there would have been no murder, or if he had called for medical attention that
21 saved her life, there would have been no murder. The court held that "the fact that he did not
22 stop, but carried out the crime, cannot be a factor that shows this killing was particularly brutal."
23 (*Id.*, 62 Cal.Rptr.3d at 920, distinguishing *Dannenberg* at 921.)

24 In the case of *In re Gray*, 151 Cal.App.4th 379 (Cal.App. 2 Dist., Div.3), the court also
25 distinguished the circumstances of *Dannenberg*, *supra*. In a case of spousal strife, where Gray's
26 wife was in the process of seeking divorce and living with her ex-husband, the victim, Gray had
27 appeared at Mrs. Gray's place of employment, demanded the keys to her 1978 Ford Thunderbird,
28 and struck her in the face causing a black eye. Gray left with the vehicle that was registered in

1 both their names. Later, Mrs. Gray and her ex-husband Ronald Waddell told her to accompany
2 him to Gray's home to pick up the keys. When they arrived at the husband's home, Waddell
3 parked near a phone booth and made two attempts to call Gray. When Ronald observed Gray
4 outside the home, Mrs. Gray accompanied Waddell when he confronted her husband. Gray
5 returned the keys. Mrs. Gray told Waddell they should go, but Waddell decided to 'teach her
6 husband a lesson' and started towards Gray, who pulled out a revolver from his back pocket.
7 When Waddell ridiculed him about that, Gray shot him once and Waddell fell to the ground.
8 Gray turned himself in to the police the following day.

9 As in *Cooper*, the Board granted Gray parole, which the Governor reversed. The
10 Governor found that the crime was "cold and calculating or dispassionate," under 15 CCR
11 §2402(c), which the appellate court found no evidence to support that characterization. The
12 Governor tried to make it "more egregious" than the minimum elements necessary to sustain a
13 second degree murder conviction by alleging some premeditation, but the appellate court
14 rejected this as well. (*Id.*, at 408.)

15 The court in *Lee, supra*, 143 Cal.App.4th 1400, likewise distinguished *Dannenberg*. In
16 *Lee*, the prisoner was engaged in a dispute with the person to whom he had sold a restaurant who
17 refused to pay him. After once confrontation, at which the victim pulled a knife, Wen Lee
18 approached him the next time armed with a pistol. Wen Lee shot the victim, wounding him, but
19 in the multiple shots, missed and accidentally killed the victim's wife. He was sentenced to
20 second degree murder. Wen Lee was 65 years old at the time of the 1989 offense. The Board
21 granted him parole in January 2005, at his sixth hearing. The Governor reversed, calling the
22 offense "atrocious." The appellate court found this offense to be no atrocious than when one
23 human being kills another, finding that Lee's crime was more commonplace than egregious.
24 (*Id.*, p. 1409-1410.)

25 In *In re Barker*, 151 Cal.App.4th 346 (Cal.App. 1 Dist., Div.2, 05/24/2007), the appellate
26 court was faced with a case of two counts of second degree murder and one count of first degree
27 murder, which occurred in 1977 by the then 17-year-old David Barker. His friend Barry
28 Braeseke elicited Barker to help kill Braeseke's parents and grandfather. Braeseke shot his

1 parents and Barker shot the grandfather, after first hitting him several times on the head with a
 2 chisel. In 2005, Barker appeared before the Board in his ninth attempt to obtain parole. By this
 3 time he had served 28 years. The Board again denied him parole, this time for 3 years. The
 4 Board characterized the offenses as “carried out in an especially cruel and callous manner,” “in
 5 a dispassionate and calculated manner,” “the victims were particularly vulnerable,” and “the
 6 motive for the crime was inexplicable or very trivial in relation to the offense in that these
 7 murders did not have to take place.” (*Id.*, at 359.)

8 The *Barker* court found no evidence to support the Board’s finding that he needed
 9 additional therapy, or that his gains were recent; instead, the court found Barker to have
 10 participated for numerous years and had matured and grew in judgment and insight, and that
 11 there were no therapeutic recommendations from the psychological evaluators. (*Id.*, at pp. 367-
 12 369.) The court found no evidence that the unsuitability factors supported denial of parole and
 13 the Board’s reliance on the circumstances of the commitment offenses violated Barker’s due
 14 process rights. (*Id.*, at pp. 370-375.) The court found no evidence to support the conclusion that
 15 Barker currently presented a threat to public safety. (*Id.*, pp. 375-377.) The court concluded
 16 that:

17 The crimes Barker committed and for which he was convicted
 18 were horrific, resulting in the senseless deaths of three people.
 19 Those crimes cannot be excused. Or minimized. At the same time,
 20 the system provides for parole in appropriate circumstances, if the
 21 prisoner has met the prerequisites for release. Resolution of these
 22 competing considerations led to the conclusion of the Court of
 23 Appeal granting Wen Lee’s petition for habeas corpus: “All
 24 murders represent the basest form of human behavior. Our laws,
 25 however, provide for mechanisms by which even murderers, in
 26 limited circumstances, are entitled to be paroled. The judiciary has
 27 an obligation to execute those laws. The record establishes that Lee
 28 does not pose an unreasonable risk to public safety. Any contrary
 conclusion lacks any evidentiary support.” (*Lee, supra*, 143
 Cal.App.4th at p. 1414, 49 Cal.Rptr.3d 931.)

25 Other similar cases predating these cases also support Petitioner Snodgrass’s claim that
 26 no evidence supports the Board’s findings or conclusion for denial of parole in his case. Some of
 27 these cases, some cited in the aforementioned cases, are *In re Scott* (*Scott I*), 119 Cal.App.4th 871

(2004); *In re Scott (Scott II)*, 133 Cal.App.4th 573 (2005); *In re Elkins*, 144 Cal.App.4th 475 (2006); *In re Smith*, 114 Cal.App.4th 343 (2003).

There simply was no evidence to support the Board's conclusion that Gary Snodgrass, after 26 years imprisonment, currently poses an unreasonable risk. The offense is not "especially heinous, atrocious, or cruel" nor does it contain elements beyond the minimum necessary to sustain the second degree murder conviction, by comparative analysis to other cases, cited *ante*, so parole denial based on the offense, violates due process in this case. Nor is there any evidence that Gary Snodgrass lacks insight or that he needs a lengthier period of time to gain insight and understanding. All of the psychological evaluations show a maturity and insight that resulted in conclusions that parole considerations need be made on other than psychological considerations because he exhibits no psychopathy nor poses more than a low risk, if at all, to public safety if paroled.

The Court must grant the petition on Ground No. 1.

Re: Ground Two:

As to ground 2, the commitment offense, prevailing law prohibits the interminable reliance on the commitment offense for repeated denials of parole.

Whatever the value of Snodgrass's crime at the time of his initial parole suitability hearing, it is now thirteen hearings later, and more than 16 years beyond his MEPD, and its probative value of his dangerousness is now far less than it was then. (*In re Roderick, supra*, 154 Cal.App.4th 242, at 277.)

Roderick noted that at the federal level:

As recently explained, " *Sass* did not dispute the principle that, other things being equal, a criminal act committed 50 years ago is less probative of a prisoner's current dangerousness than one committed 10 years ago." (*McCullough v. Kane* (N.D.Cal. June 1, 2007, No. C 05-2207 MHP) 2007 WL 1593227, *8, 2007 U.S. Dist. Lexis 43674.) Thus, "the message of [*Biggs, Sass, and Irons II*] is that the [Board] and Governor can look at immutable events, such as the nature of the conviction offense and pre-conviction criminality, to predict that the prisoner is not currently suitable for parole even after the initial denial (*Sass*), but the weight to be attributed to those immutable events should decrease over time as a

1 predictor of future dangerousness as the years pass and the prisoner
 2 demonstrates favorable behavior (*Biggs* and *Irons*).... Not only
 3 does the passage of time in prison count for something, exemplary
 4 behavior and rehabilitation in prison count for something
 5 according to *Biggs* and *Irons*. *Superintendent v. Hill*'s standard
 6 might be quite low, but it does require that the decision not be

7 arbitrary.” (*Id.* at *7, *8.) Applying this standard, the court in
 8 *McCullough* concluded the Governor**43 had violated the
 9 inmate's due process rights by denying parole 21 years into a 15-
 10 years-to-life sentence based only upon the commitment offense
 11 and past criminality, in the face of an exceptional prison record.
 12 (*Id.* at *9.)

13 Other federal courts have reached similar conclusions. (*E.g.*, *Martin v. Marshall*, 431
 14 F.Supp.2d 1038 (2006); *Rosenkrantz v. Marshall*, 444 F.Supp.2d 1063 (C.D. Cal., 2006);
 15 *Sanchez v. Kane*, 444 S.Supp.2d 1049 (C.D.Cal., 2006); *Thomas v. Brown*, ---F.Supp.2d ---,
 16 2006 WL 3783555 (N.D.Cal. 2006); *Blankenship v. Kane*, slip copy, 2007 WL 1113798
 17 (N.D.Cal. 2007); *McCullough v. Kane*, slip copy, 2007 WL 1593227 (N.D.Cal. 2007); *Fowler v.*
 18 *Butler*, slip copy, 2007 WL 1725684 (E.D.Cal. 2007); *Thelander v. Kane*, 2007 WL 2220973
 19 (N.D.Cal. 2007); *Willis v. Kane*, 485 F.Supp.2d 1126 (N.D.Cal. 2007).

16 **Re: Ground Three:**

17 The California state supreme court has acknowledged that if the parole board was
 18 operating pursuant to a *sub rosa* policy of denying parole to all prisoners in a certain category,
 19 that would be illegal. (*In re Minnis*, *supra*, 7 Cal.3d 639 (1972); *In re Rosenkrantz*, 29 Cal.4th
 20 616 (2002).) The *Rosenkrantz* court, however, set the bar at 100% denials of parole. (*Id.*, 29
 21 Cal.4th at 683-684.)

22 However, the federal district court for the Eastern District of California, *Coleman v. CA.*
 23 *Bd. of Prison Terms*, CV-S-96-0783 LKK PAN (2005) was not so deferentially generous. After
 24 discovery and testimony, the court detailed the evidence supporting a finding that under former
 25 Governors Wilson and Davis a “no parole policy” clearly existed. (**Exhibit VV**, *Coleman*
 26 decision.) See also *Martin v. Marshall*, 431 F.Supp.2d 1038, at 1048-1049 (N.D.Cal. 2006),
 27 referencing *Coleman* and noting evidence that the current Board under Schwarzenegger has also
 28 capitulated to such a policy. The State did not appeal the *Martin* decision, nor did it appeal the

1 modified judgment in *Martin*, 448 F.Supp.2d 1143, at 1145. Further, in finding the matter of
2 relief in *Coleman*'s 05-17380 appeal moot, since he obtained a new parole hearing in July 2005,
3 the Ninth Circuit did "not consider whether the district court erred in finding that the Board
4 under Governor Wilson and Governor Davis failed to provide fair parole hearings" and stating,
5 "Moreover, while we do not reach the propriety of district court's findings relating to the Wilson
6 and Davis administrations, we do note that the only hearing challenged by the habeas petition,
7 the 1995 hearing, occurred during the Wilson administration. The Ninth Circuit affirmed the
8 district court's conditional order requiring the Board to "provide a fair parole suitability hearing,
9 conducted by a board free of any prejudice stemming from a gubernatorial policy against parole
10 for murderers." (**Exhibit VV**, documents.)

11 In a 2001 case, later mooted by the parole of the petitioner Dennis Kimble, *Kimble v.*
12 *California Board of Prison Terms*, CV-97-2752-LGB (Mc), after discovery was granted and
13 evidence received, Kimble's attorney, Monica Knox, a Federal Public Defender, submitted a
14 declaration to the court summarizing what the evidence obtained via discovery showed. Of 284
15 randomly selected cases, the evidence showed 283 were found unsuitable for parole, all 283 were
16 found unsuitable based, first and primarily, on the offense, 277 showing a finding of cruel and/or
17 callous or for no reason at all as specified in the regulations. Although the Board found each and
18 every offense to be cause to find the lifer unsuitable, the offenses ranged from planned,
19 premeditated murders and torture or execution murders to accidental killings or kidnaps without
20 any injury at all. The evidence showed that although the Board almost always gave secondary
21 reasons for the findings of unsuitability, those reasons were often not supported by the facts or
22 were so questionable given the facts that they suggested the Board was simply reaching for
23 anything less than positive about the lifer. Of the 283 lifers found unsuitable, 12 had no prior
24 record at all, no disciplinaries of any kind in prison, psych reports of average or low risk of
25 danger, programming (self-help programs and work) in prison, and release plans. Four had no
26 prior record at all, no disciplinary actions in the last 10 years, a psych report of average or low
27 risk, programming (self-help programs and work) in prison, and release plans. Eighteen had
28 only minor prior record (just arrests or just non-violent juvenile actions), no disciplinary actions

1 in the last 10 years, a psych report of average or low risk, programming (self-help or work) in
 2 prison, and release plans. Eleven had more serious prior records (felony convictions) but had
 3 been disciplinary free for at least 10 years, had a psych report of low risk of danger, had
 4 programmed (self-help and work), and had release plans. Ms. Knox's declaration also included a
 5 summary of the sworn testimony of Albert Leddy, former Commissioner of the Board, who
 6 testified in the San Diego Superior Court, *In re Fortin, Sheets, Zych, Barrientos, Jackson and*
 7 *Slaman*, of the misconduct of the Board commissioners during the former *Wilson* and *Davis*
 8 administrations. (**Exhibit WW**, Declaration of Monica Knox.)

9 Thus, a history of Board and gubernatorial misconduct with regards to the parole scheme
 10 appears to be an un rebutted fact. The *Martin v. Marshall* court, *supra*, 431 F.Supp.2d 1038,
 11 cited above, found similar Board misconduct that appeared to be a continuation of that former
 12 misconduct under *Wilson* and *Davis*.

13 More recently, however, is the *In re Criscione* case. (**Exhibit OO**.) The court in that
 14 case, after having reviewed evidence obtained through extensive discovery and expert testimony,
 15 also took judicial notice of the several other cases also pending in that court. (At footnote 1)
 16 The law is that findings of fact by a lower court are presumed correct and are reviewed for clear
 17 error. (*Ghirardo v. Antonioli*, (1994) 8 Cal.4th 791, 800.) The *Criscione* court exhaustively
 18 reviewed evidence and expert testimony. The court found, by the *Rosenkrantz* 100% standard,
 19 that in all 100% of the cases reviewed where parole was denied, "counsel for Respondents
 20 stipulated that 'in all of those cases examined [by Respondent pursuant to the *Criscione*
 21 discovery orders] the Board relied on the commitment offense as a basis for denying parole."
 22 (*Id.*, at page 8.) The court found that "it was shown that 100% of commitment offenses reviewed
 23 by the Board during the 13 months under examination were found to be "especially heinous,
 24 atrocious or cruel" under Title 15 §2402(c)(1)." (*Id.*, at 8-9.) The court also noted, "A further
 25 statistic of significance in this case is that there are only 9,750 inmates total who are eligible for,
 26 and who are currently receiving, parole consideration hearings as life term inmates." (*Id.*, at 9.)
 27 The court heard from an expert statistician, Professor Mohammad Rafai, who is the director of
 28 the statistics program at San Francisco State University, where he personally teaches statistics

1 and probabilities, and it was undisputed that he was qualified to give the expert testimony that he
 2 did. He concluded that the evidence showed that in 100% of all cases examined the statistical
 3 probability is that the Board takes this action in all of its cases where parole is denied. (*Id.*, p.
 4 11.) Based on the evidence, the court concluded that the “evidence conclusively demonstrates
 5 that the Board completely disregards the detailed standards and criteria of §2402(c). (*Id.*, p. 12.)
 6 The court described the Board’s methods. (*Id.*, pp. 13-18.) The court found evidence of bias by
 7 the Board. (*Id.*, pp. 23-26.) The court concluded that “This system is malfunctioning and must
 8 be repaired.” (*Id.*, p. 30.) The court further noted that the Board’s conduct has “unwittingly
 9 invalidated the basis of the California Supreme Court’s holding in *Dannenberg*. (*Id.*, pp. 32-33.)

10 Thus, there is strong evidence that must dispel the presumption that the Board is acting
 11 correctly, such that this Court must invalidate the Board’s decision in this case, apply a more
 12 stringent standard of review, and then conduct its own determination as to what the facts are to
 13 the law, and whether the facts show that Gary Snodgrass is currently suitable for parole. If so,
 14 the Court must grant the petition and order habeas relief. To say there is no evidence under the
 15 Schwarzenegger administration of misconduct by the Board commissioners is to ignore the
 16 blatant reality that there is. In fact, this Board is worse than any before it. The Senate Rules
 17 Committee has rejected more of Governor Schwarzenegger’s appointments than any before. On
 18 or about June 25, 2008, the Rules Committee ‘fired’ Commissioners Eng and Martinez after
 19 strong opposition about their misconduct and abuse on the Board. Eng presided in Gary
 20 Snodgrass’s hearing at issue.

21 22 IV.

23 PROCEEDINGS IN THE LOWER COURTS

24 A. Superior Court:

25 Petitioner filed a petition for writ of habeas corpus to the superior court for the county of
 26 Contra Costa on or about October 26, 2007, and asked for discovery for certain facts in the
 27 respondent’s control that would support his claim of abuse of discretion. The superior court
 28 denied the petition December 18, 2007, in a 5-page decision, (**Appendix 1**), stating “there was

1 some evidence to support the Board's determination that the commitment offense was especially
2 cruel" and "there is some evidence to support the Board's assessment that the nature of the
3 commitment offense indicated petitioner would present an unreasonable public safety risk if
4 released from prison." *Id.*, decision page 3. This reasoning was at odds with the unusual
5 situational circumstances of the case where Snodgrass suffered for years abuse from the
6 stepfather and sexual abuse from the stepbrother, and when told he was being kicked out of the
7 house and was not welcome at the place to which his mother and stepfather were moving, his
8 long-term stress and anger resulted in him shooting to death the stepfather. The judge's finding
9 of "some evidence" that the crime was especially cruel was based entirely on the fact Snodgrass
10 shot the stepfather twice to kill him, and that the motivation appeared "trivial in comparison with
11 the magnitude of the offense." Without any further analysis, the Judge Theresa Canepa accepted
12 the Board's finding that Snodgrass had not participate in *enough* self help and improvements
13 programs in the last two years, and that he had only completed one anger management class in
14 that period; this totally disregarded the fact that Snodgrass had already been imprisoned since
15 1981, i.e., 25 years, and had participated in all manner of self help improvement programs.
16 There was nothing in Board regulations to require a life prisoner to participate over and over and
17 over again in the same programs he had completed, and to say he didn't participate "enough" in
18 the past two years is, on its face, ambiguous and arbitrary in light of the record, and the judge
19 should have so found. Furthermore, Judge Canepa made no analysis of the Board's statement
20 that although he had realistic parole plans he needed to "firm them up" in order to be suitable for
21 parole. The judge raised no question of what "firm them up" means, or whether this phrase was
22 vague and ambiguous as well as arbitrary in light of the many years of rehabilitation and forensic
23 evaluations showing lack of unreasonable risk, even if he didn't have a precise job offer but did
24 have plenty of marketable skills. The Board made no link between *firming up* parole plans,
25 whatever that means, and his current risk to public safety if released.

26 In addition, Snodgrass acknowledged the "some evidence" standard was the standard
27 mandated by state precedents, but argued that such standard only applied if the Board was
28 proceeding in a lawful manner under the doctrine of the "presumption of correctness of official

1 action.” He argued that where abuse of discretion dispelled that presumption, the reviewing
 2 court was free to apply a more stringent standard to ensure that justice would be done in that
 3 case. The Judge totally missed that point, and based on a finding of “some evidence” – which
 4 was clearly erroneous – also refused Snodgrass’s motion for discovery that would have garnered
 5 facts from the Board showing that it was “malfunctioning” by placing ALL murder offenders
 6 into the one single regulation that allowed denial of parole if the facts showed the crime to be
 7 “especially heinous, atrocious and cruel.” Obviously, under the law, not every murder offense
 8 can be characterized under that standard, but if the Board were doing so, then that would be
 9 proof they were proceeding in an unlawful and/or irregular manner such that the reviewing court
 10 would have to apply a more stringent standard of review. Since by a more stringent standard the
 11 Board’s decision could not be sustained, Judge Canepa avoided that judicial responsibility by
 12 denying discovery based on a finding of “some evidence” to support the Board’s conclusion.
 13 This superior court decision was an abuse of judicial discretion, and contrary to, and an
 14 unreasonable application of, clearly established precedent set forth by the United States Supreme
 15 Court in *Superintendent v. Hill*, 472 U.S. 445, 455 (1985) and *Edwards v. Balisok*, 520 U.S. 641,
 16 647 (1997).

17 18 **B. Appellate Court**

19 Upon receiving the decision denying the petition, Petitioner Snodgrass filed a petition for
 20 writ of habeas corpus to the Court of Appeal for the First Appellate District, Division Three, on
 21 March 13, 2008, which court summarily denied the petition on March 21, 2008. (**Appendix 2.**)

22 23 **C. California Supreme Court**

24 On June 11, 2008, the California Supreme Court denied Petitioner’s Petition for Review,
 25 thus exhausting all State remedies. (**Appendix 3.**)

26 Petitioner asks the Court to reverse the State court’s decision and grant the petition.
 27
 28

V.

SUMMARY

As Snodgrass showed in his State he met all the criteria for parole after thirteen previous denials of parole. The forensic psychological evaluations supported parole, classifying him as low risk. Low risk is not “unreasonable risk,” thus, there was no evidence before the Board that he posed an “unreasonable risk.” The bottom line standard for parole unsuitability is whether the evidence shows he is an “unreasonable risk.” (15 CCR sec. 2401(a); *In re Lee*, 143 Cal.App.4th 1400, 1408; *In re Dannenberg*, 34 Cal.4th 1061, 1080-1082 (2005); *Superintendent v. Hill*, *supra*, 472 U.S. at 455 (1985).) In sum, “the Board, exercising its traditional broad discretion, may protect public safety in each discrete case by considering the dangerous implications of a life-maximum prisoner’s crime individually.” *Id.* at 1071, 23 Cal.Rptr.3d 417, 104 P.3d 783. While the federal court is bound by a State’s interpretation of its own laws, *Hicks v. Feiock*, 485 U.S. 624, 629-30, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988), it is not a “potted plant” but may determine whether the assessment of dangerousness is arbitrary and capricious, or supported by some relevant and reliable evidence. (E.g., *Martin v. Marshall*, *supra*, 431 F.Supp.2d 1049 (N.D.Cal. 2006).) Snodgrass’s offense was his only crime, committed under significant stress under exigent circumstances that no longer exist and not susceptible of future duplication. He has attended therapy for years, and the forensic experts give him a clean bill of health. Where then is the ‘evidence’ he currently remains a danger to public safety?

Snodgrass has been denied parole repeatedly on this offense, despite the lack of predictive value this quarter-century old offense currently has, which raises the specter of a Board which disregards its charter to consider all relevant facts, including rehabilitation, so that it can imprison as many inmates as possible until death. Already, since 2000, 686 lifers over the age of 45 years have died in prison. (**Appendix 4.**) Does this Court find those numbers acceptable? By contrast, only 129 “lifers” have been released still alive since 2000 to 2006, out of perhaps 15,000 to 20,000 parole hearings since 2000. (**Appendix 5.**) Can anyone of good conscience find such numbers of deaths and paroles acceptable? If this were a malfunctioning dog kennel, there would be a huge public outcry, and government intervention. Yet here, there is

only *Criscione* and the conjoined cases out of Santa Clara County superior court, and the Sixth Appellate District could overturn that, but only by direct disregard of the indisputable facts.

At page 41 of his appellate petition, Snodgrass presented the court with the 2007 case of *In re Criscione*, No. 71614, on appeal in the Sixth App. Dist., No. H032048, which, after extensive discovery and expert testimony, concluded that the facts unequivocally demonstrated that the Board drives ALL life prisoners into 15 CCR sec. 2402(c)'s "especially heinous, atrocious and cruel" regulation, the exception to granting parole regulation, so that it can deny nearly every single lifer parole indefinitely until, in some cases, it arbitrarily determines that the offense was suddenly no longer relevant for parole denial. The *Criscione* court, by the California Supreme Court's own standards of statistical analysis (in *In re Rosenkrantz*, 29 Cal.4th 616), found the Board "malfunctioning" and in dire need of overhaul. The lower courts ignored this reference, and ignored Snodgrass's requests for discovery of the same evidence presented in the *Criscione* case. At pages 39-40 of his appellate petition, he showed how the Board has driven his case into sec. 2402(c) for repeated denial from his very first hearing, even escalating it at the 2006 hearing to recast it as "very much like an execution style murder," i.e., a *first degree* murder, a recasting the lower courts also ignored. There is no evidence this was an "execution style" murder; this was the culmination of a rage and pain grown by the stepfather and his stepbrother over years. These are *mitigating* factors. §2402(d)(4).

The State courts also ignored Snodgrass's demand for a higher standard of review than the "some evidence" standard, even in the fact of evidence from *Criscione* that the Board's actions were irregularly performed and not deserving of the presumption of correctness.

//

//

//

//

//

//

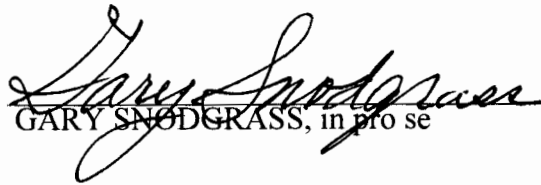
V.

CONCLUSION

WHEREFORE, for good cause shown, and a prima facie case presented, and based on the facts, the law, and the evidence presented, the Court must grant this Petition and order the relief requested in the Petition. The Court should also order discovery in this case, and allow Petitioner to present the Court with the evidence presented to the superior court in the *Criscione* case.

Dated: July 1, 2008

Respectfully submitted,


GARY SNODGRASS, in pro se

DECLARATION OF SERVICE BY MAIL

Case Name: GARY SNODGRASS v. BEN CURRY, WARDEN

Court: United States District Court,
Northern District of California

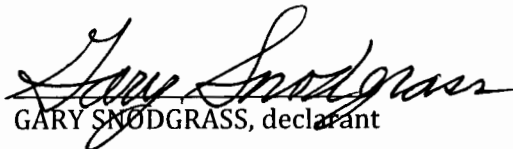
Title of Doc.: **MEMORANDUM OF POINTS & AUTHORITIES TO
PETITION FOR WRIT OF HABEAS CORPUS**

I, the undersigned, declare:

I am the party in the foregoing action. I am over 18 years of age and a citizen of the United States. On the date below I have served a copy of the attached subject document upon the opposing party by placing a true copy of same in the U.S. mail depository, proper postage affixed thereto, and correctly addressed as follows:

Attorney General of California
Attn: Scott C. Mather, Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

SWORN TO UNDER PENALTY OF PERJURY, under the laws of California, this
1st day of July, 2008, at Soledad, CA.


GARY SNODGRASS, declarant